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COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

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DELAWARE SUPREME COURT CASES
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RICKARDS V. STATE, (1/12/2011): STOPS FOR CIVIL TRAFFIC VIOLATIONS/PRETEXTUAL STOPS

An off-duty officer returned home one night to find a running car blocking his driveway. As P approached, the car slowly pulled away. P was concerned with illegal dumping and littering on his property, so he followed the car. There was no litter or trash on his property. The driver did not commit any traffic violations. P pulled the car over anyway. During the stop, P detected an odor of alcohol coming from the car. The driver, D, subsequently failed several sobriety tests. Later, D moved to suppress evidence because the stop was pretextual under *State v. Heath*, and that 21 *Del. C.*§ 4179, which governs parking, stopping, and standing violations, does not authorize P to conduct stops for civil offenses. The motion was denied.

On appeal, the Court found that the stop was not pretextual. It then concluded that 21 *Del. C.* § 802 authorizes P "to make an administrative stop for purposes of enforcing a civil traffic statute, upon a reasonable and articulable suspicion that a violation of such statute has occurred." Here, P had a reasonable and articulable suspicion that a violation of § 4179 was occurring. During the stop, police properly asked D for his id, registration, and insurance documents. It was only then that P smelled alcohol coming from D. Thus, there was a reasonable and articulable suspicion that D was intoxicated. AFFIRMED.

BROWN V. STATE, (1/25/11): RESENTENCING AFTER A VOP

D pled guilty in 2007 to four criminal offenses charged under four different indictments. He was sentenced to eleven years at Level V suspended after three years for probation. In 2010, D violated probation and was sentenced on all four charges to eight years at Level V. D was later arrested and indicted on new criminal charges. As a result, D was found guilty of another VOP. This time, the court sentenced him to three years at Level V with no probation to follow. D appealed that sentence, arguing that the court erred in imposing a sentence greater than that recommended by the SENTAC guidelines. He also asserted that the State and the judge were biased against him.

On appeal, the Court stated that its review of a sentence is extremely limited and generally ends upon a finding that the sentence is within the statutory limits. In sentencing D for the VOP, the trial court was authorized to impose any period of

incarceration up to and including the balance of the Level V time remaining to be served on the original sentence. The Court held that following D's first VOP sentence, there were seven years and seven months from his original sentence that the trial court could have reimposed after finding him guilty of his second VOP. Thus, the three years sentenced was authorized by law and was neither arbitrary nor excessive. On the issue of bias, the Court held that there was nothing in the record to support D's allegations. AFFIRMED.

MERRITT V. STATE, (1/27/2011): RIGHT TO SELF REPRESENTATION

After being indicted, D filed a "Motion to Proceed *Pro Se*." D stated "he was willing to work by and through his appointed attorney [at] the Public Defender's office," but that "only justice can be served through his participation as *Pro Se* Co-Council." The motion was denied. Between the time of his pleading and trial, D corresponded with the court, voicing his displeasure with his attorney. However, D also corresponded with his attorney about trial strategy. Before trial, D moved to have his current counsel replaced. The court decided that D did not want to continue *Pro Se*, but wanted new representation, and for him to be co-counsel. D's motion was denied and was convicted of various sexual offenses.

On appeal, D argued that he was denied his rights to self-representation in violation of the Federal and State constitutions. The Court found that "the right to self-representation, [] may only be invoked 'when the defendant has made a knowing and intelligent waiver of the right to counsel and the record must show that the defendant clearly and unequivocally made his choice.'" Even though D argued that the trial court did not make clear findings on the record, the Court found that D never clearly and unequivocally invoked his right to self representation and "there is no constitutional right, to "hybrid" representation. AFFIRMED.

WARREN V. STATE, (1/31/11): SUPPRESSION HEARINGS & VOP's

P saw 2 men go into then exit an alley a minute later. One man left the area and the other got into a car with two other males. P followed the car until it parked on its own. There were 3 men inside. D was in the front passenger seat. P saw clear plastic bags on the rear seat and on the center console. D was removed from the car. During a "pat down search" an officer supposedly "felt a hard object ***in*** [] Warren's buttocks." (emphasis added). P removed the object – 9.5 grams of cocaine. Additional concealed cocaine and marijuana was also found. D was charged with several drug offenses and a VOP.

Prior to his VOP hearing, the judge ruled that "suppression… simply doesn't apply at [VOP] Hearings." D was found in violation and sentenced to 364 days at Level V. On appeal, the Court found that D pled to the charges that constituted the VOP and thus, the appeal was without merit and devoid of any appealable issue. AFFIRMED.

DAVIS V. STATE, (2/1/2011): HEARSAY – STATEMENTS AGAINST PENAL INTEREST

D and Co-D were loitering in church parking lot when P ordered them to ground. D placed his right hand under his stomach. P cuffed D, rolled him over and immediately saw on the ground a folded one-dollar bill which contained cocaine. D was charged with possession of cocaine and related offenses. At trial, D sought to have his grandmother testify that she approached Co-D a few days after the arrest and he admitted that the drugs were his. After *voir dire* of the grandmother, the court found that the hearsay did not meet the requirements of *DRE* 804 (3) which permits, under certain circumstances, the introduction of hearsay statements made against a declarant's penal interest. The judge could not conclude that the statement was spontaneous or whether Co-D had an incentive to lie when he took the blame. Additionally, the statement was not made in close temporal proximity to the crime.

On appeal, the Court concluded that "whether there is sufficient corroborative evidence to admit a hearsay statement against interest" falls within the discretion of the judge and reversible only when there is an abuse of discretion. In determining whether corroborating circumstances indicate the trustworthiness of a hearsay statement against penal interest, courts must consider: "(1) whether the statement was made spontaneously and in close temporal proximity to the commission of the crime; (2) the extent to which the statement was truly self-incriminatory and against penal interest; (3) the reliability of the witness reporting the hearsay statement; and (4) the extent to which the statement was corroborated by other evidence in the case." The Court concluded that the judge correctly balanced the four factors. AFFIRMED.

HASSETT V. STATE, 2/8/11: GPS MONITORING/SEX OFFENDERS

In 2004, D pled no contest to four counts of Rape 3rd. He received a 40-year sentence suspended after an 8-year mandatory term for 12 years of probation. In 2007, 11 *Del.C.* §4121 (u) was enacted and requires Tier III sex offenders on probation to wear a GPS monitoring bracelet. In 2010, D was conditionally released. Before his release, D filed a motion to correct an illegal sentence as he was being subjected to GPS monitoring even though that was not part of his sentence. D argued that retroactive application of the 2007 statute violates the ex *post facto* clause of the constitution. The motion was denied.

On appeal, the Court noted that it has previously held that the sex offender registration and community notification requirements of 11 *Del. C.* §§4120 and 4121 are not punitive in nature. The purpose of the GPS monitoring provision is public safety. Thus, the retroactive application of that requirement does not implicate the *ex post facto* clause. AFFIRMED.

BETHARD V. STATE, (2/9/11): AGGRAVATED MENACING

D and his wife, W, were engaged in a lengthy and intense argument that began at home and carried over into a car ride. At one point, W jumped out of the car at a stop sign. D then chased and caught her. They continued arguing in someone's front yard. P received a report of an armed kidnapping in progress and he responded to the scene where the couple was fighting. P testified that when he arrived, W told him that D kidnapped her, had a weapon and was going to kill her. W later denied having said that and testified that she told P that D was unarmed and suicidal. P, with his gun drawn, told D to take his hand out of his pocket, raise his hands in the air, and get down on his knees. D refused. From 6' to 8' away D told P, "I got it for you and this is it." D then turned his back to P, then turned back around, lunged at P, and pulled his hand quickly out of his pocket holding a "dark object." P shot D, believing D had a weapon. The object turned out to be D's cell phone. D was convicted of aggravated menacing and other charges.

On appeal, D argued that the trial court erroneously denied his motion for judgment of acquittal on the aggravated menacing. The Court relied on the holding, in *Word v. State*, that the statutory language of 11 *Del. C.* § 602(b), aggravated menacing, requires V's subjective belief that D had a deadly weapon and D's objective physical manifestation of a weapon. The Court then found that a rational trier of fact could have found D guilty beyond a reasonable doubt. P's subjective belief was based on the armed kidnapping report, what W told him and D's actions. D objectively manifested a weapon when he pulled out a dark object. It is immaterial that P's testimony was contradicted by W. It is for the jury to judge the "credibility of the witnesses" and to "resolv[e] conflicts in the testimony." AFFIRMED.

CRUZ V. STATE (2/9/2011): EXTREME EMOTIONAL DISTRESS

D is a Mexican immigrant. His wife and children stayed in Mexico while D lived in Newark with five other people in a house. One of the housemates, V, collected rent from the tenants on behalf of the landlord. D had plans to visit his family in early February. The day before his trip, however, V told D he either had to pay the rent or he could not leave. D testified that V then lunged at him with a knife. In self-defense, and acting under the influence of EED, D stabbed V 68 times with the knife. D put V's body in a shed, cleaned up the blood in the house, then took V's SUV and left for Mexico. D forged checks he took from V before he was arrested in Texas. D was charged with Murder 1st and other offenses then had a judge trial. An expert testified that D suffered from EED at the time of the murder. The judge rejected D's defenses and found him guilty.

On appeal, D argued that the judge erred in rendering his verdict. Under Superior Ct.Crim.Rule 23 (c), a judge is only required to make a general finding regarding facts

unless either of the parties requests for specific findings. Here, no such request was made. As a result, the Court's deference to the judge's verdict is nearly absolute. To mitigate an intentional murder to manslaughter, D needs to prove two elements: (1) that he acted under EED, and (2) that there was a reasonable explanation or excuse for the EED. The Court concluded that it was reasonable for the judge to reject the EED defense. D's expert testified that he thought D was acting under EED, but he based his finding on what D had told him. However, what D told the expert was not consistent with what D told P. AFFIRMED.

McCRAY V. STATE (2/11/2011): PRIOR BAD ACT/ "BUY MONEY"/ TAMPERING WITH EVIDENCE

D was seen leaving his bathroom when P executed a daytime search warrant of D's house. In the bathroom, P found a kitchen plate with white residue on it and the toilet running as though it had just been flushed. P broke open the toilet and found a razor blade and a plastic bag containing a white object that tested positive for cocaine. D was found with $191 in his pockets, $10 of which was "buy money." P also found drugs and paraphernalia in two couches in the living room. D was charged with several drug offenses including Tampering with Physical Evidence.

At trial, over D's objection, the trial court allowed the State to inform the jury that D was found with "buy money" and to explain "buy money." The judge concluded the evidence was not inadmissible under *DRE* 404(b) as it went to "intent" for purposes of the charge of PWITD. The judge never conducted a *Getz* analysis. D also filed a motion for judgment of acquittal on the tampering charge arguing that, although he attempted to conceal and/or destroy the cocaine, he was not successful because P found it. The judge denied the motion.

On appeal, the Court noted that D never objected to the judge's failure to conduct a "formal" *Getz* analysis with respect to the "buy money." The evidence was relevant to intent, the "prior bad act" was not too remote in time, the evidence was plain, clear and conclusive because it was found on D's person and it was more probative than prejudicial. Additionally, the State was not required to produce the actual "buy money" at trial. P's testimony was sufficient. With respect to the tampering charge, the Court distinguished this case from that in *Harris*, where the drugs were plainly visible to or perceived by P when D put drugs in his mouth. Here, P had to break the toilet to retrieve the drugs. AFFIRMED.

HOSKINS V. STATE, (2/22/11): ACCOMPLICE CREDIBILITY INSTRUCTION/ SPECIFIC UNANIMITY INSTRUCTION/ 3507 FOUNDATIONAL REQUIREMENTS

Victim was hanging out with a group of people in a neighborhood. Another group, which included D, drove over to that neighborhood and shot out the window. V was shot and died. P interviewed D who stated that he did not see the shooting. However, he gave information to P leading them to Co-D, the driver. Co-D admitted he owned a Ruger 9mm but claimed that D was the shooter. P questioned D again and he admitted to the shooting. A year later Co-D gave a more detailed statement implicating D in exchange for a plea.

After a trial, a jury hung on the charges of Murder 1st and Conspiracy 1st. The jury acquitted D of attempted murder but guilty of the LIO of Reckless Endangering 1st. A mistrial was declared as to the murder and conspiracy charges. D was retried for murder. Co-d testified inconsistent with his statements but still implicated D. D testified he did not shoot a Ruger but shot a .22 in the air to scare people. The jury convicted D of Murder 2nd.

On appeal, D argued that the trial court should have, *sua sponte*, issued a *Bland* instruction regarding the credibility of a Co-D's testimony. The Court concluded that the judge is required to give such an instruction. An attorney's failure to request it is an issue for post-conviction relief. D also argued that the trial court was required, *sua sponte*, to issue a single theory unanimity instruction because the State argued that D was either an accomplice or principle. Under *Probst*, such an instruction is required if: 1) jury told of several alternatives to commission of crime; 2) actions are conceptually different; and 3) State presented evidence of each alternative. The Court concluded that the second "*Probst* factor was not present because the facts of this case do not present the kind of "conceptually different" or "distinct" actions[.]" Finally, the Court rejected an argument that the trial court should have *sua sponte* prevented the State from entering evidence of Co-D's 3507 statement because it failed to ask him whether it was truthful. While the prosecutor's question was not the preferred technical inquiry, it did not prejudice D's substantial rights. AFFIRMED.

HALL V. STATE, (3/3/11): EMERGENCY EXCEPTION DOCTRINE AND WARRANTLESS ENTRY OF HOME

P reported to house after 911 call and banged on the door for several minutes. D poked his head out the window and appeared intoxicated. V, very agitated, opened the door. D had a deep gaping wound so P unsure if D had just been injured. D said he got injured earlier at a club. P took V out kicking and screaming. V told P that D had grabbed her so D was cuffed. One officer yelled, "gun." P conducted sweep of residence and found gun on kitchen countertop. D was charged with, among other things, several drug offenses and a weapons offense. The trial court denied a motion to suppress and D was found guilty

. On appeal, D argued the trial court erred because it applied a general reasonableness standard rather than applying the *Guererri* test for the "emergency

exception doctrine." The Court concluded that the judge applied the correct test. The warrantless entry into the home was reasonable because the State showed by a preponderance of evidence that: P had reasonable ground to believe there was an emergency and immediate need for assistance for protection of life or property; search was not primarily motivated by intent to arrest or seize evidence; and there was a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. This was based on the 911 hang up call, V's agitation and D's gaping wound. AFFIRMED.

GALLMAN V. STATE, (3/3/11): CONSTRUCTIVE POSSESSION/ POSSESSION OF A DEADLY WEAPON/ CARRYING A CONCEALED DEADLY WEAPON

D was in the right rear passenger seat of a car when it was stopped by police. D told P that the car belonged to her father but she typically drove it. When the driver opened the glove compartment to get the registration and insurance, P saw a gun. P searched the car and found an unloaded, sawed-off shotgun on the right rear floorboard under a sweatshirt where D was seated. D was charged with possession of a firearm with a removed, altered, or obliterated serial number, PDW and two counts of CCDW. At trial, the judge denied D's request for an instruction as to the PDW and CCDW counts regarding whether D "had power and intention to exercise control over the weapon." An instruction was given on both actual and constructive possession. D was found guilty of 1 count of PDW and 1 count of CCDW.

On appeal, the Court concluded there was no error with respect to CCDW. Accessibility is the focus of that offense. To evaluate accessibility one must consider: whether D had to change position to reach the weapon; whether D could reach the weapon while driving; and amount of time it would take d to reach weapon if provoked. However, with respect to PDW, the D's intention is significant consideration. Thus, the instruction on the constructive possession without inclusion of "intent" undermined D's defense that she did not possess the weapon because she had no intention to exercise control over it. AFFIRMED IN PART/REVERSED IN PART.

DRUMMOND V. STATE, (3/3/11): SELF REPRESENTATION

D was charged with Burglary 2nd and related offenses. After the State presented its case at trial and against the advice of counsel, D chose to testify. However, the judge denied his request to "speak to the Courts and to the jurors, so I would really like to fire counsel at this moment." The prosecutor told the court that D had an absolute right to represent himself. So the court asked D if he understood that it was D's choice but that he could not later complain about it. D said he understood and the judge allowed him to

go *pro se*. D testified in a narrative and made a closing argument. D was then found guilty of all charges and sentenced to life in prison as an H.O.

On appeal, the Court found that the judge failed to "conduct a hearing to inquire into [D]'s decision, warn [D] of the dangers and disadvantages of self-representation, and establish a record that [D] knows what he is doing." The judge also failed to inform D of certain critical facts known as the *Briscoe* factors. REVERSED.

TACKETT V. STATE, (3/4/11): HABITUAL OFFENDER STATUTES

D was sentenced for PWITD as an H.O. pursuant to 11 *Del.C.* §4214(a) to 7 years in prison with credit for 12 days. The order also stated, "This is a mandatory sentence pursuant to DE164752000aFE." D filed a motion to correct sentence arguing that 16 *Del.C.* §4752(a) does not authorize a mandatory term and, thus, he was erroneously being denied good time credit contrary to §4214(a). The trial court denied the motion.

On appeal, the Court agreed with D and found the sentence illegal because it was internally contradictory and imposed a punishment not authorized by judgment of conviction. While 16 *Del.C.* §4763 requires imposition of mandatory-minimum sentences for repeat offenders who are sentenced under that section, it does not apply in this case because the judge sentenced D under §4214 (a) instead. REVERSED.

YUSKIEWICZ V. STATE, (3/8/11): IMPROPER TURN/REASONABLE SUSPICION FOR TRAFFIC STOP

P saw D make an excessively wide turn when he crossed into the opposing lane of traffic. P followed D who was driving at "unusually low speeds." P pulled D over. While checking his license and registration P smelled a strong odor of alcohol and saw that D's eyes were glassy. P saw 2 unopened beer bottles in the passenger seat. D failed all the administered field tests and after he was arrested, his BAC was .151. D was charged with DUI and making an improper turn. D filed a motion to suppress which was denied. After a stipulated trial, D was convicted of his 6th DUI.

On appeal, D argued that P failed to provide specific details in their report to establish that D committed a traffic violation and improperly stopped him for a traffic violation based on P's erroneous interpretation of section 4152(a)(1). P did not note in his report or recall at the hearing how far D crossed over the dividing line or whether any cars were parked on the side of the road at that time. Also, P acknowledged that it is not unusual for people to slow down when P following them. The Court concluded that the wide turn wherein D crossed the lane of traffic was illegal and unreasonable based on P's training and experience. It was a credibility determination for the court in accepting that P stopped D for two violations. The Court rejected D's argument that 4152 does not make crossing over the center line of an undivided 2-way road a *per se* violation. While the

statute does not expressly state that such conduct is illegal, it is well understood that it is prohibited. Even so, the unusually slow speed was sufficient for a stop. AFFIRMED.

JACKLIN V. STATE, (3/8/11): ADMINISTRATIVE SEARCHES/SAFE STREETS

P.O. Dupont received a tip that D was selling marijuana and crack. He also learned that D had motor vehicle offenses which he never reported. P.O. obtained approval from his supervisor to search D's house. However, the search was not conducted. Over a month later, P.O. received another tip that D was selling out of a white van. P.O. obtained approval to search D's house. P.O. watched D in white van make 2 turns without signaling so he notified police who, along with P.O., conducted a traffic stop. As a result D was found in possession of marijuana and admitted there was marijuana in his house. D was charged with drug offenses. He filed a motion to suppress that was denied.

On appeal, the Court upheld the stop and search. It concluded that the P.O. had obtained information that D had violated his probation in that he had not reported motor vehicle offenses. This, by itself, permitted P.O. to arrest D without a warrant. After the lawful arrest, D admitted he co-owned marijuana seized in the van and in his kitchen. Additionally, P.O. had supervisor authority for the search. The Court also rejected D's argument that Safe Streets is being used by police as a "stalking horse." The U.S. Constitution has rejected this argument and D waived his State Constitutional argument because he did not raise it below. AFFIRMED.

CURTIS V. STATE, (3/9/11): PEDESTRIAN STOP

P received information from a C.I. that a tall, thin, dark skinned, black male wearing dark sunglasses would possess a large amount of heroin at a specific city block in the city. P conducted surveillance of that block when they observed D who matched the description walking down the sidewalk. P1 got out of an unmarked car and stood behind a parked van. As D passed, P1 stepped out from behind the van, did not say anything but was wearing a vest with "police" written on the front and back and his hand on a taser. After making eye contact, D threw 2 items on the grass. P then drew his taser and ordered D to the ground. The two items were bags of heroin. D was charged with drug offenses and filed a motion to suppress which was denied.

On appeal, the Court concluded that P1 did not even speak with D before D dropped the drugs "within a fraction of a second." "If [P], in his police vest with his hand

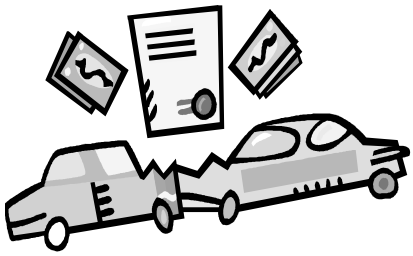
on his taser, had continued to walk towards [D] and had restricted [D]'s movement or had ordered [D] to stop, a reasonable person in [D]'s position arguably would have believed he was not free to ignore the police presence. Because there was no "encounter" between D and P, D was not seized. AFFIRMED.

STANLEY V. STATE, (3/15/11): HABITUAL OFFENDER/ 8TH AMENDMENT/MISTRIAL

D was convicted of offenses after he broke into an elderly couple's home, threatened them at gunpoint, robbed them and assaulted one of them. D was sentenced as an habitual offender to 3 life sentences and additional time. On appeal, D argued that his sentence violated the 8th Amendment and that the trial court erred when it denied a joint continuance request and in sentencing D without an adequate hearing on the merits.

Under the two-step test set forth in *Crosby*, the Court concluded that D's sentence did not violate the 8th Amendment, in part because of the brutal nature of the underlying crime, D's lack of remorse and his extraordinary criminal record. *Crosby* requires a "threshold comparison of the crime committed and the sentence imposed." If this comparison "leads to an inference of gross disproportionality" the Court must compare the sentence to others for similar cases to see if it is within sentencing norms. The Court also concluded that the trial court did not err when it refused to grant a mistrial after the V left the stand, touched the officer on the arm and whispered, "that's him." The trial court offered a curative instruction. However, the parties agreed to have the jury polled. No one on the jury responded that they had seen or heard the exchange. Therefore, there was no abuse of discretion. AFFIRMED.

MOORE V. STATE, (3/17/11): JURISDICTION OVER RESTITUTION



D crashed his car into another and pled to Vehicular Assault 2nd and DUI. His insurance paid for injuries and property damage to V-1 & V-2. The sentencing judge ordered, among other things, restitution in an amount to be determined by a PSI. No reference was made to which parties. The plea agreement only listed V-1 & V-2. Subsequently, D was discharged from probation. On the new order, the judge marked out the section referring to restitution. Two months later, another judge issued a modified sentence order mandating that D pay restitution totaling $19,968.88 which was to be distributed to V-1, insurance companies, collection agencies and physical therapy. The order was issued without notice to D. Five years later the court issued a civil judgment against D without notice or hearing because he had not made any payments. For about another year, D made no payments and the State made no effort to collect. The State sent him a Notice of Intent to Set-Off Refund then later intercepted his tax refund. D then

made arrangements to make further payments. His attorney reviewed the record then sought a modification to vacate the civil judgment. This was denied.

On appeal, the Court concluded that Superior Court lacked jurisdiction over D to issue the restitution order. The Court reached this conclusion based on the specific facts of this case: 1) D and the State had a specific contractual agreement regarding restitution; and 2) the court discharged D from probation *successfully*. Also, the Court perceived "serious due process concerns with the procedure the Superior Court followed in issuing the restitution order and the later civil judgment[.]" REVERSED.